IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

MARTHA HART, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No. 99CV210774
vs.	)	
	)	Honorable Douglas E. Long, Jr.
	)	
WORLD WRESTLING FEDERATION, et al.,	)	
	)	
Defendants.	)	

WWFE DEFENDANTS' OPPOSITION TO THIRD PARTY DEFENDANTS LEWMAR, LTD.'S, LEWMAR INC.'S AND AMSPEC INC.'S MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, MOTIONS FOR SUMMARY JUDGMENT

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World Wrestling Federation Entertainment, Inc. ("WWFE"), formerly known as Titan Sports, Inc., Vincent McMahon and Linda McMahon (hereinafter, collectively, the "WWFE Defendants"), file this Opposition to Third Party Defendants Lewmar, Ltd.'s and Lewmar Inc.'s (hereinafter, collectively "Lewmar") and Amspec Inc.'s ("Amspec")[1] Motions to Dismiss or, in the Alternative, Motions for Summary Judgment (the "Motions").

Preliminary Statement

The parties come before this Court on the Settling Defendants' request to be dismissed from any and all cross-claims for contribution/indemnity based on settlement agreements (the "Settlement Agreements") allegedly entered into in "good faith" with Plaintiffs. Significantly, the Settlement Agreements proffered to the Court arose under highly suspicious circumstances and raise a number of significant questions regarding the "good faith" of the Plaintiffs. As explained more fully below, these alleged Settlement Agreements originally contained highly improper provisions which led Judge Long to refuse to approve them, despite Plaintiffs' and Settling Defendants' emphatic, repeated requests. Because Settling Defendants' Motions seek to improperly undermine fundamental legal rights held by the Non-Settling Defendants and specifically recognized by Missouri law, the Motions before the Court must be denied.

Summary of the Argument

On an incomplete evidentiary record, the Settling Defendants seek to dismiss WWFE Defendants' third-party claims pursuant to a motion to dismiss under Rule 55.27 or, alternatively, a motion for summary judgment under Rule 74.04. The Settling Defendants allege that WWFE Defendants' claims of contribution and indemnity are purportedly barred by the affirmative defense for "good faith" settlement agreements under R.S.Mo. § 537.060. The

[1] For ease of reference, Lewmar and Amspec shall be referred to collectively as the "Settling Defendants." The remaining Defendants in this suit, WWFE Defendants, Bobby Talbert, Matt Allmen, Jim Vinzant, James Williams and the City of Kansas City, shall be collectively referred to as the "Non-Settling Defendants."

Settling Defendants' Motions must be denied, however, under a plain reading of the Missouri Rules of Civil Procedure.

First, Missouri law precludes treating the Settling Defendants' Motions as Motions to Dismiss pursuant to Rule 55.27 because, by their express terms, the Settling Defendants' Motions present and rely upon matters outside the pleadings. The Settling Defendants' Motions present, rely upon and expressly incorporate by reference an appendix of exhibits, all of which are outside the scope of WWFE Defendants' pleadings. These matters include, *inter alia*, (i) Plaintiffs' purported Stipulation for Dismissal with Prejudice with respect to Lewmar and Amspec; (ii) the purported Dismissal and Mutual Release Agreement entered into by and between Plaintiffs, Lewmar and Amspec; (iii) cover pages of the deposition transcripts of Lewmar corporate representatives Matthew Townsend, Mark Swales and Mark Gibson; (iv) cover pages of the deposition transcripts of the eleven witnesses the Settling Defendants allege had been deposed as of April 11, 2000 in these proceedings; (v) Certificates of Service for Discovery Requests to Lewmar and Lewmar's Certificate of Service with respect to its responses to same; (vi) Certificates of Service for paper discovery from Lewmar to Plaintiffs and Defendant Amspec; and (vii) July 3, 2000 Letter from Craig S. O'Dear to the Honorable Carl Gum, Jr. setting forth WWFE Defendants' proposed deposition schedule. The presence of and reliance on any one of the foregoing matters—no less all six—as part of the Settling Defendants' Motions necessarily convert the Motions into motions for summary judgment pursuant to Rule 55.27(a).

Second, pursuant to Rule 74.04(c)(2) of the Missouri Rules of Civil Procedure, this Court's adjudication of the Settling Defendants' Motions as motions for summary judgment is premature as a matter of law. In violation of clear and express provisions of Rule 74.04(c)(2), WWFE Defendants have been denied sufficient time to conduct discovery on the issues raised by the Settling Defendants' Motions. Indeed, WWFE Defendants have not been able to conduct *any* discovery on these issues in large part due to the Settling Defendants' outright refusal to respond to numerous discovery requests. Adjudication of the Settling Defendants' Motions on the

current, incomplete evidentiary record, without affording WWFE Defendants an opportunity to examine the "good faith" of the Settling Defendants' Settlement Agreements, would have the potential, devastating effect of barring for all time WWFE Defendants' legal rights vis-à-vis the Settling Defendants without full inquiry as to whether the statutory "good faith" requirement has, in fact, been met as required by Missouri law. Certainly, the potential irretrievable loss of such valuable legal rights warrants, at a minimum, allowing WWFE Defendants a brief period of time simply to conduct discovery on the issues raised by the Settling Defendants' Motions. Pursuant to Rule 74.04(c)(2), WWFE Defendants have attached to this Opposition the Affidavit of Craig S. O'Dear (the "O'Dear Affidavit" or "O'Dear Aff.")(attached at Tab 1 of the Appendix)[2] setting forth the specific categories of discovery WWFE Defendants require, at a minimum, to properly oppose the Settling Defendants' Motions. Significantly, these discovery categories have previously been submitted to, and approved by, this Court's July 19, 2000 Order (attached at Tab 2 of the Appendix) adopting WWFE Defendants' proposed discovery plan.

Third, even if this Court were to adjudicate the Settling Defendants' Motions without allowing WWFE Defendants to engage in discovery—which it should not—the Settling Defendants' Motions fail as a matter of law. Missouri courts "**consider summary judgment an extreme and drastic remedy . . . because the procedure implicates the denial of due process by denying the opposing party its day in court**." *Bargefrede v. American Income Life Ins. Co., et al.*, 21 S.W.3d 157, 160 (Mo. App. W.D. 2000)(internal quotations omitted)(emphasis added), *quoting ITT Commercial Finance Corp. v. Mid-America Marine Supply Co.*, 854 S.W.2d 371, 377 (Mo. banc 1993). Accordingly, summary judgment is only appropriate if "the movant establishes a legal right to judgment and the absence of any genuine issue as to any material fact required to support that right to judgment." *ITT,* 854 S.W.2d at 378. Here, there are two fundamental problems that preclude summary judgment:

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[2] All reference to the Appendix are to the Appendix in Support of WWFE Defendants' Opposition to Third Party Defendants Lewmar, Ltd.'s, Lewmar, Inc.'s and Amspec, Inc.'s Motions to Dismiss or, in the Alternative, Motions for Summary Judgment filed herewith.

(1) The Settling Defendants' purported Settlement Agreements are not legally effective under Missouri law because they never received court approval as required for the settlement of claims under the Missouri wrongful death statute and as required for the settlement of claims brought on behalf of minors generally. Without legally effective settlement agreements, the Settling Defendants cannot avail themselves of the affirmative defense under R.S.Mo. § 537.060; and

(2) A fundamental disputed issue of fact exists with regard to the Settling Defendants' central claim; that is the alleged "good faith" of the Settlement Agreements entered into between the Settling Defendants and Plaintiffs. On such a disputed record, Missouri law precludes summary judgment.

Relevant Factual Background

In connection with Owen Hart's tragic and accidental death, Plaintiffs originally sued, among other defendants, Lewmar and Amspec, on June 15, 1999, alleging strict liability and negligence causes of action for defectively designing and manufacturing products which caused or contributed to cause Owen Hart's death and for improperly warning consumers of the dangers of this equipment. On March 17, 2000, after nine months of discovery, Plaintiffs filed a First Amended Petition (attached at Tab 3 of the Appendix), in which they reasserted these same claims against Lewmar and Amspec.

By reasserting their claims against Lewmar and Amspec in the First Amended Petition, Plaintiffs certified to this Court under the Missouri Rules of Civil Procedure that, as of March 17, 2000, their claims against Lewmar Ltd., Lewmar Inc. and Amspec Inc. were "warranted by existing law" and that their allegations and factual contentions against Lewmar Ltd., Lewmar Inc. and Amspec Inc. had "evidentiary support or, . . . [were] likely to have evidentiary support after a reasonable opportunity for further investigation and discovery." *See* Mo. R. Civ. P. 55.03(b). The factual allegations that Plaintiffs specifically certified on March 17, 2000 had "evidentiary support" include, *inter alia*, the following:

> Amspec [Lewmar Ltd. and Lewmar Marine Inc. (now known as Lewmar Inc.)] sold, delivered, and/or distributed such products including the subject harness system herein referenced for ultimate

sale and/or use in . . . the State of Missouri, to be used by a foreseeable class of persons, of whom Owen Hart was a member. (First Amended Petition, ¶¶ 15, 19, 23).

The harness and rigging system and related components then failed, causing Mr. Hart to free fall seventy-eight feet (78') towards the center arena and the wrestling mat. (First Amended Petition, ¶ 57).

The aforesaid harness system and rigging apparatus and related component parts used therein were then in a defective condition, unreasonably dangerous when put to their reasonably anticipated uses for reasons including, but not limited to, the following:

(a) Defendant Amspec [Lewmar Ltd. and Lewmar Marine Inc.] failed to have a locking snaphook which would have prevented rollout or disengagement of the snaphook;

(b) Defendant Amspec [Lewmar Ltd. and Lewmar Marine Inc.] failed to have a snaphook sized compatible with the member to which it was connected preventing unintentional disengagement of the snaphook;

(c) Defendant Amspec [Lewmar Ltd. and Lewmar Marine Inc.] failed to provide a snaphook that was proper for the purpose based on strength testing requirements;

(d) Defendant Amspec [Lewmar Ltd. and Lewmar Marine Inc.] failed to use a harness system, rigging apparatus and related component parts that matched the particular situation of Owen Hart;

(e) Defendant Amspec [Lewmar Ltd. and Lewmar Marine Inc.] failed to design a body harness in a manner to distribute fall arrest forces; and

(f) Defendant Amspec [Lewmar Ltd. and Lewmar Marine Inc.] was negligent in further particulars unknown to Plaintiffs, but which will become known during the course of discovery. (First Amended Petition, ¶¶ 221, 248, 276).

The subject harness system, etc. was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use. (First Amended Petition, ¶¶ 227, 254, 269).

The aforesaid harness system was used in a manner reasonably anticipated by this defendant [Amspec, Lewmar Ltd. and Lewmar

> Marine Inc.] and others. (First Amended Petition, ¶¶ 222, 228, 249, 255, 277).
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> Defendant Amspec [Lewmar Ltd. and Lewmar Marine Inc.] held [themselves] out as [entities] which could carefully and competently design, manufacture, select materials for, design maintenance programs for, inspect, supply, distribute, and sell harness systems, rigging apparatus and related component parts thereof. (First Amended Petition, ¶¶ 232, 260, 288).
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> The harness system, etc. and related component parts designed, manufactured, and sold by defendant Amspec [Lewmar Ltd. and Lewmar Marine Inc.] were defective and otherwise flawed which had the effect of creating a dangerous condition to its users [by allowing the harness system to unlock]. (First Amended Petition, ¶¶ 234, 262, 290).
>
> Defendant Amspec [Lewmar Ltd. and Lewmar Marine Inc.] failed to properly and adequately notify, inform, or warn customers or users of the dangers and defects. (First Amended Petition, ¶¶ 242, 270, 298).
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> As a direct and proximate result of the lack of warning of the dangerous conditions as existed when the harness system, etc. was sold by defendant Amspec [Lewmar Ltd. and Lewmar Marine Inc.], Owen Hart was caused to die. (First Amended Petition, ¶¶ 244, 272, 300).

As will be seen below, the limited discovery taken to date supports many of these allegations.

On April 14, 2000, less than one month after Plaintiffs made these claims against Lewmar and Amspec, Plaintiffs executed a Dismissal and Mutual Release with Amspec (the "Amspec Original Settlement Agreement")(attached at Tab 4 of the Appendix), in which Plaintiffs purportedly released all claims against Amspec for **ZERO DOLLARS**. The sole consideration allegedly given by Amspec was "the release and discharge of any and all potential claims or actions for frivolous litigation, sanctions, and [the] like . . . ." (*See* Amspec Original Settlement Agreement attached at Tab 4 of the Appendix). Plaintiffs entered an identical agreement with Lewmar for **ZERO DOLLARS** (the "Lewmar Original Settlement

Agreement")(attached at Tab 5 of the Appendix) on April 18, 2000.[3] As with Amspec, the alleged consideration given by Lewmar was "the release and discharge of any and all potential claims or actions for frivolous litigation, sanctions, and [the] like . . . ." (*See* Lewmar Original Settlement Agreement attached at Tab 5 of the Appendix).

Plaintiffs' counsel attempted to explain the decision to release the Settling Defendants from this lawsuit less than one month after Plaintiffs reasserted claims against them by representing to this Court: "the truth of the matter is . . . that a man died for a number of reasons involving negligence, having nothing to do, as it turns out, with the defendants who are seeking to be released, whose equipment was totally and improperly misused by the WWF, which was discovered upon discovery." (See April 28, 2000 Transcript at pp. 35:19-36:2 attached at Tab 6 of the Appendix). Problematically, Plaintiffs' explanation is at odds with the sworn testimony of the Settling Defendants themselves, and the evidence of record as a whole. If, in fact, Plaintiffs' explanation were true, Plaintiffs would have had to have learned something in the discovery that occurred between March 17 and April 14, 2000 from which a reasonable plaintiff would determine that no viable claim existed against Amspec, Lewmar Ltd. or Lewmar Inc. Moreover, if, in fact, Plaintiffs explanation were true, Plaintiffs would have had to have learned something between March 17 and April 14, 2000 that established Plaintiffs' allegations to be so "frivolous" that, rather than recovering against the Settling Defendants, Plaintiffs, themselves, were actually at serious risk of paying damages to the Settling Defendants for filing

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[3] Interestingly, although the Lewmar Dismissal and Mutual Release is not dated until April 18, Plaintiffs obtained an Order from this Court on April 17, 2000 dismissing Plaintiffs' claims against the Lewmar Defendants and purporting to affix Court approval to settlement documents not yet executed. As Judge Long explained during an April 28, 2000 telephone conference on this issue:

> [Mr. Robb] called and said that he had good news for me; that he was dismissing four people or four attorneys from the action . . . . Then he said they would like to have a court order. And I instructed Dawn to go ahead and affix my signature to just a dismissal. I figured it was a straight dismissal. Then I discovered that actually what I had done after I talked to these gentlemen [non-Settling Defendants' counsel] was actually approve of whatever agreement they [Plaintiffs and Settling Defendants] were entering into. I immediately withdrew that order.

(*See* April 28, 2000 Transcript at pp. 16:23-17:11 attached at Tab 6 of the Appendix).

frivolous claims. In any event, if, in fact, Plaintiffs' explanation were true, Plaintiffs would have had to have learned some significant facts since the filing of their suit to compel them to conclude that all of their claims against all of the Settling Defendants were of **ZERO** value.

The relevant question, therefore, becomes: What critical evidence was uncovered during this three to four week period (or, indeed, since the filing of suit), which would lead a reasonable plaintiff acting in good faith to conclude that release of an alleged claim for frivolous litigation and sanctions constitutes remotely adequate consideration for the release of claims against all of the Settling Defendants?[4] To aid the Court in determining whether discovery in this interim period supports Plaintiffs' contention of good faith, the WWFE Defendants set forth below a sampling of what was learned about Plaintiffs' claims against Lewmar and Amspec between March 17 and April 18, 2000.[5]

A. Liability of Lewmar Ltd., Lewmar Inc. and Amspec Inc.

To date, no deposition has been taken of any employee of Lewmar Inc., Lewmar Ltd.'s United States-based subsidiary. The depositions of three designated corporate representatives of Lewmar Ltd. were taken on April 10 and 11, 2000 in London, England. The deposition transcripts of Lewmar Ltd.'s corporate representatives Matthew Townsend, Mark Swales and Mark Gibson are attached at Tabs 7-9 of the Appendix, respectively. Although Plaintiffs' counsel noticed those depositions, Plaintiffs' conducted only 122 minutes of examination over the course of two days with all three proffered witnesses combined. The deposition of Amspec corporate representative Myles Johnson was taken April 6 and 7, 2000.

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[4] Plaintiffs never served written discovery on Amspec or Lewmar Inc. They did serve one set of Interrogatories and one set of Requests for Production of Documents on Lewmar Ltd. Those responses were provided to Plaintiffs on February 29, 2000, well in advance of Plaintiffs' Second Amended Petition restating claims against Defendants Lewmar and Amspec.

[5] The facts set forth herein as discovered from March 17 to April 18, 2000 are not intended to comprehensively represent the evidence elicited in support of liability claims against Amspec and Lewmar. In addition to deposing the corporate representative of Lewmar, Inc., WWFE Defendants believe significant additional discovery is necessary to fully understand the role of the Settling Defendants in Owen Hart's tragic death.

Mr. Johnson's deposition transcript is attached at Tab 10 of the Appendix. Again, although the deposition spanned two days, Plaintiffs' counsel questioned Mr. Johnson for 111 minutes. Notwithstanding the cursory review conducted by Plaintiffs, the following facts bearing on Lewmar's and Amspec's liability were evinced, many over Plaintiffs' counsels' objection.[6]

1. **Lewmar Had Reason to Know its Trigger Latch Snap Shackle May be Used In a Way to Cause Harm to a Human Beings and, Because of that Knowledge, Knew of the Important Need to Warn Consumers of Its Dangers**

- Matthew Townsend is the product manager for the Hatch and Hardware Division of Lewmar Marine Ltd. (now known as Lewmar Ltd.), headquartered in Havant, England. (Townsend at 6:1-2, 12-15). He was designated to speak on behalf of Lewmar Ltd. on the method and manner of marketing and distributing the trigger latch shackle. (Townsend at 8:21 - 9:2).

- Lewmar's battle cry throughout this litigation has been that the trigger latch snap shackle is designed for "marine use" only. However, as Lewmar's own product manager admits, "[T]here are 101 applications for that shackle. Only one of them is actually applicable to its design." (Townsend at 66:11-13). In fact, the patent application for the trigger latch shackle posits uses in non-marine applications. (Swales at 103:3-104:1). Despite this knowledge, Lewmar has no policies or procedures in place to insure the trigger latch shackle is distributed for marine use only. (Swales at 105:8-18; 10:8-16; 160:8-13; 194:24-195:7).

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[6] Ironically, despite the fact that Plaintiffs' counsel ostensibly was taking the Lewmar and Amspec depositions, Plaintiffs' counsel actually made more objections to questions asked by other Non-Settling Defendants' counsel of Lewmar and Amspec than Lewmar's and Amspec's own counsel (156 objections by Plaintiffs' counsel vs. 139 objections by Lewmar's counsel). Plaintiffs' counsel's objections to questions seeking potentially incriminating testimony on Plaintiffs' own claims raises serious concerns as to collusion or cooperation between Plaintiffs and the Settling Defendants—adverse parties—prior to the depositions. In one objection Plaintiffs' counsel went so far as to state:

> Mr. Robb: Same objection as before to the extent that the wording of that question postulates a legal responsibility on behalf of Lewmar where there, under these circumstances, would be none. (Swale Deposition at 188-193:6)

This is truly a remarkable position for Plaintiffs' counsel to take less than two weeks after reasserting claims against Lewmar in the First Amended Petition specifically alleging such liability.

- In 1996, Lewmar learned an accident occurred in Hamburg, Germany in which one of its shackles was involved. (Townsend at 114:8-14; Swales at 59:11-17). Apparently, a person was injured during a "catapult ride." In a "catapult ride," two bungee cords are attached to a harness holding a human, and the harness is attached to the ground, stretching the bungee cords. The harness is then released and the human flies into the air. (Townsend at 23:3-13).

- Following the Hamburg accident involving the Lewmar shackle, Lewmar was concerned another accident could pose a threat or risk to Lewmar. As a result, Lewmar executives discussed adding to the product various warnings. The number of warnings they considered "stretches as long and as wide as your imagination can reach." (Townsend at 29:1-24). Ultimately, however, no warning was added to the trigger latch shackle.

2. Lewmar Limited Its Warnings to Mid-Europe And, Possibly, to Hamburg, Germany

- Also because of concern over the Hamburg accident, Lewmar sent letters to and telephoned the two Lewmar distributors in the Hamburg, Germany area and instructed them not to sell trigger latch shackles outside the marine industry. (Townsend at 24:15 - 25:7; 25:23 - 26:6; 26:16-20; Swales at 57:20-58:3; 59:1-10).

- The letter, dated September 11, 1996, was sent by Hendrik Van der Linde, the Mid-Europe subsidiary sales manager. It is unclear at this point in discovery whether the letter went only to the two Hamburg distributors or to all Lewmar mid-Europe distributors. (Townsend at 39:12-19). It is clear that it was not provided to United States purchasers of the product. (Swales at 60:21-61:8; 108:8-109:3; 192:18-21). The letter included an attached statement that read in pertinent part:

> It has come to our attention that Lewmar product has been used for non marine applications. Lewmar product is designed solely for use in the marine environment and is in no way intended for use outside of that field.
>
> * * *

Any approach for the purchase of product for non marine applications should be forwarded directly to Lewmar Marine Limited at Havant where an assessment of the suitability of the product for the task required will be made.

- In his letter enclosing the warning statement, Mr. Van der Linde indicated a statement similar to the above warning would be included in the next Lewmar catalog. (Townsend at 35:19 - 36:11). It was not. (Townsend at 37:21-25).

- Although the warning was issued, at most, to mid-Europe distributors, and possibly only to Hamburg distributors, Lewmar had the ability to send this warning to all its distributors through a mass mailing. (Townsend at 75:16-18). Lewmar even could have reviewed the customer lists of its subsidiaries itself, as those lists can be accessed by Lewmar Ltd. in Havant, England. (Swales at 130:24-131:15; 132:4-6; 132:18-21). For that matter, Lewmar could have assured a warning was given to all end users of the trigger latch shackle because, according to Mr. Townsend, "[i]t is quite easy to put on to a product what it should be used for." (Townsend at 98:16-17). Mark Gibson, Lewmar's technical manager for Hatch and Hardware products, supported that conclusion stating that to change the tooling to add lettering to the shackle would cost "probably two or three thousand pounds, not a great deal of money." (Gibson at 90:20-91:6).

3. Lewmar Executives Met in 1998 And Discussed How To Avoid Another Accident With the Trigger Latch Shackle

- Following the Hamburg accident, Lewmar executives met in 1998. All Lewmar international subsidiary managers were present at the 1998 meeting, during which they discussed limiting the sale of trigger latch shackles to the marine industry and not supplying them for non-marine uses. (Townsend at 21:15-20; Swales at 71:17-72:8; 73:3-16). The intent was for subsidiary managers to convey this information to distributors and for distributors to communicate the message to front line salespeople. (Townsend at 94:24 - 95:25). The purpose of limiting the sale of trigger latch snap shackles to marine use was to prevent further misuse of the product. (Townsend at 90:2 - 91:1).

- At the 1998 meeting, the subsidiary managers were instructed to make sure an accident such as that in Hamburg did not happen again and to inform the factory of any distribution of the trigger latch shackles outside of the marine industry. (Townsend at 22:3-11; 61:5-18).

- Randy Blanton, manager of Lewmar Inc., Lewmar's United States subsidiary, and Simon Hartley, Lewmar's CEO, were present at the 1998 meeting, at which all subsidiary managers were warned to review customer lists to detect any customer that may be supplying Lewmar products for non-marine use. (Townsend at 41:22 - 43:20). As a matter of fact, Lewmar subsidiaries review their customer lists as a matter of course at least once a year anyway. (Townsend at 112:2-20).

- Lewmar's actual policy; however, does not require distributors to supply trigger latch shackles for marine use only, but requests that they supply trigger latch shackles for non-marine use only with authority from Lewmar. (Swales at 79:25-80:3; 164:12-19). In fact, Lewmar Ltd.'s finance director admitted, "There are any number of uses for our product . . . . Any number of our products could be used for things outside the marine industry." (Swales at 164:6-11).

4. For Years, Lewmar And Its Distributors Knowingly Provided Trigger Latch Shackles for Use in the Stunt Industry

- Despite the injury accident in 1996 and these directives in 1998, Lewmar Ltd.'s Hatch and Hardware Division manager learned, allegedly after this lawsuit arose, that Lewmar had been supplying products to Action Specialists, a company in the movie industry rigging business, since 1996 or 1997. (Townsend, 43:15-18; 44:10 - 45:1; *see also*, Swales at 88:11-15). Action Specialists was a reseller of Lewmar products. Lewmar directly provided products to Action Specialists at a discount, to be marked up and resold to end users. (Townsend at 78:5-19). Nothing about Action Specialists' business indicates it is connected with supplying equipment or services for marine use. Action Specialists supplied Lewmar trigger latch shackles to Amspec.

- Port Supply also is a reseller of Lewmar goods. Port Supply also supplied Lewmar trigger latch shackles to Amspec. Port Supply was instructed not to supply Amspec with trigger latch shackles only after this lawsuit arose, not after the 1996

accident in Germany and not after the 1998 meeting of Lewmar executives. (Townsend at 82:3-25).

- Lewmar executives are aware Lewmar trigger latch shackles are available to non-sailors for purchase. (Townsend 116:22 - 117:6).

- In fact, Lewmar executives considered that consumers may look at shackles for the purpose of suspending a human being, but determined consumers would not choose a trigger latch shackle because "[t]here are plenty of others on the market that are both more secure and singularly less expensive." (Townsend at 30:11 - 31:9).

- Over the years, Svendsen's Marine, Port Supply and Action Specialists supplied Lewmar snap shackles to Amspec. (Johnson 39:17-25; 122:8 - 123:24). All three suppliers were aware the trigger latch shackles would be used in the stunt industry. (Johnson at 128:19 - 130:12; 195:14-18). In fact, someone at Lewmar authorized this "non-marine" application of the trigger latch shackles. (Swales at 155:21-156:10).

- Amspec's CEO called Lewmar Inc. (Lewmar's United States subsidiary) in 1997 or 1998 to see if Amspec could get better pricing for the trigger latch shackle buying direct from Lewmar than through Svendsen's, Port Supply or Action Specialists. He explained to Lewmar that the trigger latch shackles are used in stunts. Lewmar directed him to its California sales representative, who informed him the cost would be the same. (Johnson at 124:19 - 127:6; 332:14-21). Amspec was not told Lewmar would not supply trigger latch snap shackles for use in the stunt industry.

5. Amspec Sold the Trigger Latch Shackle to Bobby Talbert to Be Used in a Wrestling Performance, Knowing It May Be Used to Suspend a Human Being Above the Ground

- Amspec is in the business of making and selling equipment for the special effects and stunt industry. (Johnson at 6:11-13; 9:2-21). Amspec sold equipment to stunt rigger Bobby Talbert, including a jerk vest manufactured by Amspec and a trigger latch snap shackle manufactured by Lewmar. (Johnson at 22:5-17; 26:3-5).

- At the time Amspec sold Bobby Talbert the equipment he used during the May 23, 1999 WWF event, Amspec believed Talbert was working with Ellis Edwards and told Talbert the equipment he was purchasing was the same as that used by Ellis Edwards. (Johnson at 108:16-23; 187:24 - 188:2). Amspec knew Ellis Edwards rigged projects for the wrestling business and that "he's flown other people" by lowering them into the ring. (Johnson at 105:7-14; 106:3-15; 288:9-19).

- Amspec's CEO admits that flying is not an unusual part of stunt activity. Nonetheless, he never informed any customer that they should not use the Lewmar trigger latch snap shackle to suspend a human being above ground. (Johnson at 368:23 - 369:24).

- Amspec's CEO understands trigger latch snap shackles are used in the stunt industry because certain stunts, including some descent-type stunts, require the ability to "quickly release from something to possibly continue the finale of the stunt." (Johnson at 181:12 - 182:17).

- Defendant Bobby Talbert, who has yet to be deposed, specifically contacted Amspec for the purpose of purchasing the proper and safe equipment for executing the stunt, including descending a human from a great height. (Talbert Aff. ¶ 3)[7].

- Defendant Bobby Talbert expressly related to Amspec information about the specific stunt he was setting up. (Talbert Aff. ¶ 4).

- Defendant Bobby Talbert specifically asked for stunt equipment of the exact type used by World Championship Wrestling ("WCW") stunt expert, Ellis Edwards. (Talbert Aff. ¶¶ 4-6).

- Defendant Bobby Talbert was never warned or advised at any time by Amspec or Lewmar that the stunt equipment he was being sold for the Owen Hart stunt was improper or unsafe in any manner. (Talbert Aff. ¶ 7).

- The stunt equipment Amspec sold to Defendant Bobby Talbert specifically included the Lewmar snap shackle that Plaintiffs

[7] The Affidavit of Bobby Talbert (the "Talbert Affidavit" or "Talbert Aff.") is attached at Tab 11 of the Appendix.

have alleged was improperly designed, unsafe and otherwise defective. (Talbert Aff. ¶ 7).

- The Lewmar snap shackle sold to Defendant Bobby Talbert by Amspec and alleged by Plaintiffs to be unsafe and defectively designed contained no label or warning that it was unsafe for use in stunts or was only designed for marine applications. (Talbert Aff. ¶¶ 7-8).

- Amspec and Lewmar never provided Defendant Bobby Talbert with any literature or materials containing any such warnings. (Talbert Aff. ¶¶ 7-8).

6. Even In Marine Applications, the Trigger Latch Snap Shackle May Be Used to Suspend Human Beings

- When sailing, people ascend the mast for a variety of reasons, including "[t]o inspect the masthead fittings, to inspect the lights, navigational aids, and any blocks and sheets that would be found at the head of the mast . . . . The mast could be 120 feet high." (Townsend at 69:22 – 70:12; Gibson at 65:2-12).

- Although Mr. Townsend, a charter sailing skipper, admits it is possible a person would go up a mast by attaching a halyard (long rope used to haul the sail up a mast and used to pull humans up masts of up to 120 feet (Townsend at 54:19-21; 55:14-23)) to a harness they are wearing using a trigger latch shackle, he points out that "anybody going up a mast is risking their life any way . . ." (Townsend at 48:19 – 50:16).

- When a person ascends the mast of a boat by a halyard, he can connect to the halyard either by using the shackle which is attached to the halyard or by tying the halyard to his harness. (Townsend at 57:9 – 58:12). Any type of shackle, including a trigger latch shackle can be used for this purpose. (Townsend at 59:7-23; Swales at 95:5-96:9).

- In fact, similar to stunt rigging, "there are no rules or regulations gauging or governing how one goes up a mast." Mr. Townsend, himself, has ascended the mast of a boat he was skippering without using a safety harness because "[i]t was quite simply the fastest, most expedient way to get up the mast." (Townsend at 71:7-22).

- The patent application for the trigger latch snap shackle expressly provides that one of its claims is the ability to have a lanyard attached to it to enable the user to open the shackle by pulling the lanyard.[8] (Patent Application at p. 8, ¶ 5; Gibson at 72:2-15). Mr. Townsend removes lanyards from trigger latch snap shackles when he sees them, because he believes "they could cause during flogging the shackle to come undone." (Townsend at 63:21 – 64:10). Because of this problem, Mr. Townsend approached Lewmar subsidiary managers to discuss removing the ring available for attaching the lanyard. After discussion, they decided to leave the ring on so that a lanyard could be attached. (Townsend at 64:20 – 66:4).

B. Liability of Amspec, Inc.

- Approximately 75% of the time, customers buy Amspec's products directly off the shelf. More and more, however, customers come to Amspec with a project and ask them to design and build some kind of solution to help them do what they are trying to do. (Johnson at 80:5 - 81:19; 262:19 - 264:7).

- Amspec sewed a lanyard, with a ring on the end, on all trigger latch snap shackles before selling them. (Johnson at 160:7-22). Until the Owen Hart accident, Amspec had no concern about the Lewmar trigger latch snap shackle being used in the stunt industry. (Johnson at 175:10-18).

- Toward the end of 1999, Universal Studios returned a trigger latch snap shackle to Amspec because it released prematurely during use. (Johnson at 165:8 - 167:12). As of April 6, 2000, Amspec was still carrying Lewmar trigger latch snap shackles for resale. (Johnson at 171:19 - 172:4).

- Amspec does not supply any warnings discussing any particular risk associated with any Amspec products. (Johnson at 198:10-15). It includes in all shipments a warning indicating consumers use its products at their own risk, but does not provide any information about the proper use of the product. (Johnson at 301:8 - 302:2).

[8] The Patent Application for the Shackle (the "Patent Application") is attached at Tab 14 of the Appendix.

- As previously stated, Amspec sold Defendant Bobby Talbert the Lewmar snap shackle, which Plaintiffs have alleged was unsafe and defectively designed for use in the Owen Hart stunt, without ever warning Bobby Talbert that the Lewmar shackle was only intended for marine applications and unsafe for human stunts.

C. The Suspicious Circumstances Behind and Impropriety of the Settlement Agreements

Despite the foregoing record evidence establishing significant claims against the Settling Defendants for liability to **both** the Plaintiffs and the Non-Settling Defendants, Plaintiffs and the Settling Defendants have entered into the Settlement Agreements for **ZERO** dollars under which they purport to completely erase any and all claims for contribution and indemnity held by the Non-Settling Defendants. As explained more fully below in Section C.1., the Original Settlement Agreements filed with Judge Long and the record surrounding their execution and submission raise serious questions regarding the true intentions, motives and "good faith" behind these settlement arrangements. The revised Settlement Agreements, recently submitted to the Court and on which the Settling Defendants premise these Motions, have never been approved by any court and, themselves, raise significant questions on the "good faith" issue.

Law and Argument

A. Missouri Law Precludes Treating the Settling Defendants' Motions as Motions to Dismiss

On their face, the Settling Defendants' Motions present, rely upon and expressly incorporate by reference, an appendix of exhibits all of which are outside the scope of WWFE Defendants' third-party petition. On this record alone, the Settling Defendants' Motions cannot be treated as motions to dismiss and must be treated as motions for summary judgment under Missouri law.

Rule 55.27 governs the adjudication of the Settling Defendants' Motions. Rule 55.27 provides in pertinent part that if

> matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 74.04.

Mo. R. Civ. P. 55.27(a). This governing standard is significant in two respects.

First, Rule 55.27 mandates the Settling Defendants' Motions be treated as motions for summary judgment. It is indisputable that by submitting an appendix of exhibits in support of their Motions, the Settling Defendants' Motions present and rely upon matters outside the WWFE Defendants' pleading. Indeed, by expressly incorporating such documents by reference into their Motions, the Settling Defendants have compelled this Court to consider these extraneous matters as part of their Motions. Since these extraneous matters are technically part of the Settling Defendants' Motions, this Court could not exclude such extraneous matters without excluding the Settling Defendants' Motions themselves.

Moreover, as a practical matter, the Settling Defendants rely on these extraneous matters to support their purported defense to WWFE Defendants' third-party claims. For example, the Settling Defendants proffer Plaintiffs' purported voluntary dismissal with prejudice and the purported Settlement Agreements to allegedly prove the existence of a good faith settlement pursuant to R.S.Mo. § 537.060. Leaving aside the inadequacy of such evidence to establish an affirmative defense under R.S.Mo. § 537.060 (particularly the fact that within such evidence the Settling Defendants have presented no evidence of the "good faith" of Plaintiffs, which is the central focus under Missouri law), the Settling Defendants clearly intended for this Court to consider these extraneous matters beyond the pleadings in adjudicating their Motions. On this record and pursuant to Rule 55.27, this Court's treatment of the Settling Defendants'

Motion is not discretionary: the Settling Defendants' Motions "**shall** be treated as one for summary judgment." Mo. R. Civ. P. 74.04 (emphasis added).

Second, Rule 55.27 requires that where a court treats a Motion to Dismiss as a Motion for Summary Judgment all parties "must be given notice and reasonable opportunity to present relevant summary judgment material." *Sale v. Slitz*, 998 S.W.2d 159, 162 (Mo. App. S.D. 1999). Missouri law, thus, precludes a party from filing a dispositive motion based on select facts outside the pleadings without affording the non-moving party the opportunity to fully develop the record for the court through discovery. Here, WWFE Defendants have been denied any opportunity to develop facts through discovery necessary to oppose the Settling Defendants' Motions. This certainly is not "reasonable" as mandated by Rule 55.27. Accordingly, in addition to precluding treating the Settling Defendants' Motions as Motions to Dismiss, Rule 55.27 also precludes adjudication of the Settling Defendants' Motions as Motions for Summary Judgment without affording WWFE Defendants sufficient opportunity to conduct discovery to be able to properly oppose such Motions.

B. Adjudication of the Settling Defendants' Motions Pursuant to Rule 74.04 Is Premature As a Matter of Law

Under Missouri law, summary judgment "**should not be granted** before the moving party has had a full and fair opportunity to support his case by evidence to be discovered." *Lewis v. El Torito Restaurants, Inc.*, 806 S.W.2d 46, 47 (Mo. App. W.D. 1991)(emphasis added), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 2514 (1986). Particularly where a trial court treats a Motion to Dismiss as one for Summary Judgment, the court "must first notify the parties that it is going to do so, and give the parties an opportunity to present all materials pertinent to a motion for summary judgment." *Wea Crestwood Plaza, L.L.C. v. Flamers Charburgers, Inc.*, No. ED 76311, 2000 WL 14460 at *3

(Mo. App. E.D. Jan. 11, 2000); *Shores v. Express Lending Servs., Inc.*, 998 S.W.2d 122, 126 (Mo. App. E.D. 1999).

To this end, Rule 74.04 expressly provides for situations where—as here —a non-moving party requires additional discovery to respond to a motion for summary judgment. Specifically, Rule 74.04(c)(2) provides that:

> [i]f the party opposing the motion for summary judgment has not had sufficient time to conduct discovery on the issues to be decided in the motion for summary judgment, such parties shall file an affidavit describing the additional discovery needed in order to respond to the motion for summary judgment and the efforts previously made to obtain such discovery. For good cause shown, the Court may continue the motion for summary judgment for a reasonable time to allow the party to complete such discovery.

Mo. R. Civ. P. 74.04(c)(2). Courts have a duty under this rule "to ensure that the parties have been given a reasonable opportunity to make their record complete before ruling on a motion for summary judgment." Moore's Federal Practice 3d § 56.10[8][a] (interpreting the identical language in Fed. R. Civ. P. 56(f), the federal analogue to Rule 74.04(c)(2)). In this regard, the rule "should be liberally construed" such that courts should err on the side of allowing the non-moving party time to conduct the requested discovery. *Id.*

Here, WWFE Defendants have not been able to take any discovery on the specific issues raised by the Settling Defendants' Motions. The gravamen of the Settling Defendants' Motion is the alleged applicability of the "good faith" affirmative defense under R.S.Mo. § 537.060. The Settling Defendants contend that the "good faith" affirmative defense bars WWFE Defendants' third-party claims for contribution and indemnity.

> Section 537.060 provides:
>
> When an agreement by release covenant not to sue or not to enforce a judgment **is given in good faith** to one or two or more persons liable in tort for the same injury or wrongful death, such

> agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. The agreement shall discharge the tort-feasor to whom it is give from all liability for contribution or noncontractual indemnity to any other tort-feasor.

R.S.Mo. § 537.060 (emphasis added). By its express terms, the protections set forth in R.S.Mo. § 537.060 are only available—assuming all other conditions are met—where a settlement agreement is entered in "good faith." At a minimum, therefore, WWFE Defendants must be permitted to take discovery on whether the settlement agreements are in "good faith." In essence, the Settling Defendants are requesting that this Court blindly adopt their sleight of hand filings and dismiss all claims against them without allowing for an examination of the record, or, otherwise stated, letting anyone look behind the curtain. Where, as here, questions have been raised about the good faith of settlement agreements, Missouri law does not permit such an approach.

Indeed, all parties and, most importantly, Judge Long, explicitly recognized that such discovery would take place once third-party claims against the Settling Defendants were filed. In the April 28 Conference with the Court, Plaintiffs' counsel and Judge Long specifically acknowledged the need for discovery as to the Plaintiffs' "good faith" in entering the Settlement Agreements:

> Mr. Robb: [I]f [the Non-Settling Defendants] then wish to cross claim, that puts it in a posture where then the integrity and the **Plaintiffs' good faith** [sic] . . . . The cases are all very clear . . . . **It's our good faith in releasing them**. If it becomes a posture that that's relevant, we will get into it.
>
> Judge Long: I'm sure they [the Non-Settling Defendants] will all be deposing everybody to see what the terms of the dismissal and mutual releases were.

> Mr. Robb: At this point [as of April 28, 2000] there is no legal basis to which that is relevant, because there is no cross-claim, nor is there an effort to seek contribution. I don't think there is any basis for them to inquire of it at this point. It's none of their business until it becomes an issue in the case.

April 28, 2000 Transcript at 43:1-20 (emphasis added) attached at Tab 6 of the Appendix. Now that such third-party claims have been brought, WWFE Defendants must be permitted to engage in the discovery of Plaintiffs' motives and purported "good faith," which Plaintiffs' counsel and Judge Long anticipated in the April 28 Conference.

The determination of whether an agreement is in "good faith" is a question of fact to be determined by the fact-finder. *Henry v. Tinsley*, 218 S.W.2d 771, 77-78 (Mo. App. 1949)("The question of good faith is a question of fact."). Missouri courts have generally adjudicated the issue of the "good faith" of an agreement entered into pursuant to R.S.Mo. § 537.060 in an evidentiary hearing at which the non-settling party is afforded the opportunity to submit evidence challenging the "good faith" of the agreement. *See e.g., Lowe v. Norfolk and Westward R.R. Co.*, 753 S.W.2d 891, 893 (Mo. 1988); *Newman v. Ford Motor Co.*, Nos. 20573 & 20560, 1997 WL 778512 at **3-4 (Mo App. S.D. Dec. 19, 1997), *modified on other grounds*, 975 S.W.2d 147 (Mo. 1998)(en banc).[9]

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[9] In fact, commentators have observed that an evidentiary hearing is the only means by which a non-settling defendant can reasonably challenge a settlement agreement entered into pursuant to a contribution-bar statute. For example, as one commentator observed with respect to a statutory scheme analogous to R.S.Mo. § 537.060,

> The nonsettling parties have almost no chance of establishing that settlements which adversely affect their interests were collusive or were not entered into in good faith if they are not allowed to call and examine witnesses, including, but not limited to, the parties to the settlement, and to offer evidence. Fairness hearings which do not allow the nonsettlors to offer evidence, but restrict them to the self-serving paper record compiled by the settlers, do not provide the nonsettlors with meaningful opportunities to challenge settlements which were arrived at without their input and which adversely affect their interests, or to establish collusion or bad faith on the part of the settlers.
>
> The courts have consistently recognized in other contexts that evidentiary hearings are necessary where questions of collusion or bad faith are involved. They have repeatedly declared that questions of collusion and bad faith are fact-sensitive questions, that the resolution of those questions turns upon determinations of motive, intent, state of mind, and credibility, and that such

In reviewing the issue of "good faith" under contribution-bar statutes, courts have considered such factors as, inter alia, (i) the totality of the circumstances surrounding the settlement agreements; (ii) the reasonableness of the settlement payment amount relative to what a reasonable person, at the time of settlement, would estimate the settling defendant's liability to be; (iii) the relative fault of the settling defendants; (iv) the likelihood of plaintiff prevailing on the settled claims; (v) the resources of the settling defendants; (vi) the insurance policy limits of settling defendants; (vii) the amount of the settlement compared to the overall claim; (viii) whether there has been any fraud, collusion, or tortious conduct between the plaintiff and the settling defendants; and (ix) whether the settlement agreements would substantially impair the remaining defendants from receiving a fair trial. *See, e.g., Lowe*, 753 S.W.2d at 893-94; *Mattco Forge, Inc. v. Arthur Young & Co.*, 38 Cal. App. 4th 1337 (1995); *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. App. 488, 499, 698 P.2d 159, 167 (1985); *Dacotah Mktg. and Research, L.L.C. v. Versatility, Inc.*, 21 F. Supp. 2d 570 (E.D. Va. 1998). In essence, "good faith" requires, at a minimum, that the agreement at issue be entered into as part of an adversarial, negotiated, arm's-length, non-collusive, *bona fide* transaction.

Although a discovery plan designed to probe these precise issues was proposed by WWFE Defendants and approved by this Court under its July 19 Order, the Settling Defendants have refused to participate in such discovery citing the pendency of the instant Motions. This leaves WWFE Defendants in an unfair Catch-22: the Settling Defendants seek to have their Motions adjudicated on a summary basis, yet refuse to provide WWFE Defendants with the discovery necessary to properly respond to their Motions. The proper resolution to this conflict under Rule 74.04(c)(2) is for this Court to allow WWFE Defendants to engage in the discovery necessary to respond to the Settling Defendants' Motions—most of which has already been

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questions are usually inappropriate for resolution by summary judgment – i.e., on the basis of affidavits or paper records.

J. Whitney Pesnell, The Contribution Bar in CERCLA Settlements and Its Effect on the Liability of Nonsettlors, 58 La. L. Rev. 167 (1997).

proposed to and approved by this Court—rather than to force WWFE Defendants to prematurely respond to a dispositive motion, which could have the effect of permanently extinguishing WWFE Defendants' legal rights, on an incomplete record.

In connection with this Opposition, WWFE Defendants submit the O'Dear Affidavit that sets forth the reasonable discovery WWFE Defendants require to respond to the Settling Defendants' Motions. In addition to setting forth the nature of the required discovery, the O'Dear Affidavit sets forth the basis as to why each category of discovery is reasonably necessary to respond to the Settling Defendants' Motions. In general terms, this discovery entails discovery on (i) the specific facts and circumstances surrounding Plaintiffs' apparent change in heart in concluding the Settling Defendants should be released on such significant claims in the face of the extensive liability evidence for **ZERO DOLLARS**; (ii) the discussions between Plaintiffs' counsel and Settling Defendants' counsel concerning the nature of the testimony Plaintiffs' counsel hoped to elicit from the Settling Defendants in their depositions; (iii) the facts and circumstances surrounding Plaintiffs' counsels' decision to condition the original Settlement Agreements on the Settling Defendants' agreement to "not cooperate" with the Non-Settling Defendants; (iv) the facts and circumstances surrounding the decision to include an express provision in the original Settlement Agreements conditioning their effectiveness on "court approval;" (v) the extent and nature of discussions held between Plaintiffs' counsel and the Settling Defendants' counsel, the facts and circumstances surrounding the Plaintiffs and Settling Defendants' decision to amend and modify the Settlement Agreements, and to specifically delete the original, highly improper "non-cooperation" clause and the "court approval" clause; (vi) the facts and circumstances surrounding Plaintiffs' after-the-fact explanation that the Settlement Agreements are supported by consideration in the form of a release of Plaintiffs on "abuse of process" claims from the Settling Defendants; and (vii) whether collusion occurred between Plaintiffs and the Settling Defendants. In light of this significant discovery which is yet to occur, the Settling Defendants' Motions cannot be decided at this time.

C. Even If this Court Were to Adjudicate the Settling Defendants' Motions As Motions for Summary Judgment At this Time—Which It Should Not—the Settling Defendants Motions Fail As A Matter of Law

1. The Settling Defendants' Alleged "Good Faith" Affirmative Defense Fails As A Matter Of Law Because The Settling Defendants' Purported Settlement Agreement Is *Not* Legally Effective Under R.S.Mo. § 537.060

The Settling Defendants' alleged "good faith" affirmative defense to WWFE Defendants' third-party claims of contribution and indemnity fails as a matter of law because the Settling Defendants never entered into legally effective settlement agreements with Plaintiffs to properly release them from this action. Without legally effective settlement agreements, the Settling Defendants cannot avail themselves of the R.S.Mo. § 537.060's statutory affirmative defense to WWFE Defendants' claims for contribution and indemnity. In fact, as a practical matter, the Settling Defendants (along with Lift-All, Inc. against whom WWFE Defendants have not brought third-party claims) are still parties to these proceedings.

By way of background, the Court will recall that Plaintiffs originally entered into settlement agreements with the Settling Defendants dated April 14 and 18, 2000, that contained specific provisions requiring (1) this Court's "express approval " of the settlements to make them legally operative, and (2) the Settling Defendants to "not cooperate" with WWFE Defendants during the pendency of this litigation.[10]

Further adding to the suspicious circumstances surrounding the Settlement Agreements, Plaintiffs surreptitiously filed the Original Settlement Agreements with Judge Long requesting the Court to "approve" their terms and the dismissal of Lewmar and Amspec as

[10] Significantly, the "non-cooperation" provision of the Original Settlement Agreements in and of itself raised serious questions regarding the true intent and motives behind the Settlement Agreements. This type of provision is precisely the type of provision that has been seen in other documents drafted by Plaintiffs' counsel and condemned by leading ethics experts. For example, James Jeans, a practitioner and professor of law recognized as a leading, national expert on legal ethics, condemned this type of provision as an "effort to obstruct justice" and a "violation of basic ethical behavior demanded of trial advocates." (*See* Affidavit of Professor James Jeans attached at Tab 12 of the Appendix).

original defendants in these proceedings. Inexplicably, these pleadings were filed by Plaintiffs' counsel: (i) without advance notice to any of the Non-Settling Defendants; (ii) without service of the Motion on any counsel of record; and (iii) without any request for a Court hearing prior to approval. Completely unaware of the surreptitious nature of Plaintiffs' filing, this Court initially entered an Order dated April 17, 2000, as an administrative matter, approving Plaintiffs' Court Approval Motion—and, unknowingly, approving the terms of the Original Settlement Agreements. These circumstances, however, were brought to the Court's attention by WWFE Defendants' counsel upon being served with the Court's April 17 Order—the first notice received by WWFE Defendants' counsel (indeed, by any of the non-settling defendants' counsel) of Plaintiffs' Court Approval Motion.

Immediately upon learning of the improper nature and illegality of Plaintiffs' filings, this Court (Judge Long) rescinded its April 17, 2000 Order. As a direct result of such rescission, this Court rescinded the only "court approval" Plaintiffs ever tried to obtain for their purported Settlement Agreements. During the April 28 hearing with the Court, Judge Long made clear that, despite Plaintiffs' and the Settling Defendants' urgings to the contrary, this Court would not bless, endorse, be a party to, and/or approve the Lewmar and Amspec Original Settlement Agreements. In retrospect, the reason for the Settling Defendants' and Plaintiffs' inclusion of the "court approval" provision as an express term in the Original Settlement Agreements and the surreptitious filing of the Original Settlement Agreements for approval with the Court, was clearly to stealthily gain judicial imprimatur on the "good faith" of the agreements. Despite the Settling Defendants' and Plaintiffs' underhanded tactics, such judicial endorsement was never obtained.

Following this Court's repudiation of Plaintiffs' and the Settling Defendants' Motion for Court Approval of settlement, Plaintiffs entered into newly-executed, revised Settlement Agreements with the Settling Defendants. These revised Settlement Agreements—on which the Settling Defendants now rely in asserting their affirmative defense—deleted all

references to the requirement of court approval and, indeed, **have never been approved by any court**.

Accordingly, the Settlement Agreements, which purport to release the Settling Defendants from this case, are **not** legally effective for two reasons. First, the settlement of any claim brought under the Missouri wrongful death statute, R.S.Mo. § 537.080, **must be approved by court order**. R.S.Mo. § 537.095 (emphasis added); 2 Missouri Civil Trial Practice, volume II, § 6.20 at 6-12. Indeed, two decisions that are controlling authority on this Court have expressly recognized that R.S.Mo. § 537.095.3—the statutory provision that governs settlement of wrongful death claims—requires court approval of settlement. In *State ex rel. Hilker v. Sweeney*, the Missouri Supreme Court, sitting *en banc*, noted in upholding the enforceability of a settlement agreement entered into between a defendant and plaintiffs in a wrongful death action that "**the trial court, after a hearing required by § 537.095.3, R.S.Mo. 1986, entered an order approving the settlement**." *State ex rel. Hilker v. Sweeney*, 877 S.W.2d 624, 625-26 (Mo. 1994) (en banc)(emphasis added).

More specifically, in *State ex rel. Sharma v. Meyers*—a case heavily relied upon in the Settling Defendants' Motions and Suggestions in support thereof—the Court of Appeals for the Western District directly addressed the issue of whether "under § 537.060 a tort-feasor who has settled with the plaintiff . . . is subject to contribution by a joint tort-feasor against whom the plaintiff has obtained a judgment." *State ex rel. Sharma v. Meyers*, 803 S.W.2d 65, 65 (Mo. App. W.D. 1990). In ruling that the "good faith" settlement under § 537.060 barred the non-settling defendant's claims for contribution, the Court of Appeals explicitly found that "**[s]ince this was a wrongful death case, under § 537.095.3 the circuit court was required to and did approve the settlement** . . . ." *State ex rel. Sharma*, 803 S.W.2d at 66 (emphasis added). In the face of this controlling authority, it is undeniable that the settlement agreements purportedly entered into between the Settling Defendants and Plaintiffs required court approval—that was never obtained—to be legally effective.

Secondly, Missouri law independently mandates that any settlement by a next friend or guardian on behalf of a minor must receive court approval. Under R.S.Mo. § 507.184(2), a next friend or guardian has the power and authority to contract for the settlement of a minor's claim provided that "**such contract and settlement shall not be effective until approved by the court.**" R.S.Mo. § 507.184(2)(emphasis added). The statute also provides that a next friend or guardian has the power and authority to execute and sign a release that is binding upon a minor "**provided the court order the execution of such release**." *Id.* (Emphasis added).

The underlying purpose of the statute is to ensure that "any settlement is in the best interest of the child." *Fiegener v. Freeman-Oak Hill Health Sys.*, 996 S.W.2d 767, 774 (Mo. App. S.D. 1999). The court will not simply allow a parent to bargain away a minor's right to bring civil action against an alleged tort-feasor. *Y.W. By and Through Smith v. National Super Markets, Inc.*, 876 S.W.2d 785, 789 (Mo. App. E.D. 1994). To this end, Missouri courts have established a two-step process to dispose of minor's claims: (1) have court approval of a settlement, and (2) provide for release to accomplish the settlement. *Kress v. Lederle Lab.*, 901 S.W.2d 206, 209 (Mo. App. E.D. 1995).

Here, it is undisputed that Martha Hart purports to have brought this action under the Missouri wrongful death statute as the "next friend" on behalf of her minor children Oje and Athena Hart.[11] It is further undisputed that the purported Settlement Agreements entered into between and among the Settling Defendants and Plaintiffs purport to settle the claims Oje and Athena Hart. It is also undisputed that the purported Settlement Agreements between and among the Settling Defendants and Plaintiffs purporting to settle the claims of, among other plaintiffs, minors Oje and Athena Hart has not been approved by any court. Under R.S.Mo. § 507.184, the

[11] There is some question as to whether Martha Hart is, in fact, the legally-appointed "next friend" of her children Oje and Athena Hart. At this time, WWFE Defendants do not admit or acknowledge that Martha Hart is the legally-appointed "next friend" of Oje and Athena Hart. Accordingly, WWFE Defendants do not waive and expressly reserve their right to challenge Martha Hart as the properly-and legally-appointed "next friend" of Oje and Athena Hart as circumstances warrant.

purported settlement agreements simply cannot be legally effective with regard to the claims of Oje and Athena Hart. Accordingly, having not been properly settled, released and dismissed, the Settling Defendants continue to stand as defendants in this litigation.

By its express terms, the existence of a "release by agreement" is a necessary legal prerequisite to trigger the protections of R.S.Mo. § 537.060. Since the settlement agreements purporting to settle and release Plaintiffs' wrongful death claims against the Settling Defendants are legally ineffective under Missouri law, the Settling Defendants are without agreements on which to base their affirmative defense under R.S.Mo. § 537.060. The Settling Defendants statutory affirmative defense to WWFE Defendants' third-party claims for contribution and indemnity, therefore, must fail as a matter of law.

2. Even If This Court Finds The Settling Defendants Entered Into Legally Effective Settlement Agreements—Which It Should Not—The Settling Defendants' Motions Fail To Satisfy The Summary Judgment Standard Under Missouri Law

As noted at the outset, under Missouri law, "summary judgment is considered to be an extreme and drastic remedy which borders on the denial of due process." *Lawson v. St. Louis-San Francisco Ry. Co.*, 629 S.W.2d 648, 650 (Mo. App. E.D. 1982). In particular, "[t]he grant of summary judgment for a defendant is an extreme remedy because it denies a plaintiff his day in court and, hence, is proper only if the court determines from the pleadings and affidavits on file that there are no material issues of fact and that the movant is entitled to judgment as a matter of law." *Y.G. and L.G. v. The Jewish Hospital of St. Louis*, 795 S.W.2d 488, 494 (Mo. App. E.D. 1990). This disfavor of summary judgment especially applies in the context of third-party claims. Missouri law holds that a "third-party defendant should not ordinarily be entitled to a summary judgment on a third-party petition against it so long as plaintiff's pleaded theories include the possibility of recovery against defendant/third-party plaintiff on theories that could also expose the third-party defendant to liability for all or part of the judgment." *Southard v.*

Buccaneer Homes Corp., 904 S.W.2d 525, 530 (Mo. App. S.D. 1995). Thus, where—as here—a defendant seeks summary judgment on an affirmative defense, the defendant, as the movant, bears

> the burden of establishing a legal right to judgment and the absence of any genuine issue as to any material fact required to support that right to judgment. . . . The burden on the summary judgment movant is to show a right to judgment flowing from facts about which there is not dispute. Summary judgment tests simply for the existence, not the extent, of these genuine disputes. Therefore, where the trial court, in order to grant summary judgment, must overlook material in the record that raises a genuine dispute as to the facts underlying the movant's right to judgment, summary judgment is not proper.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 378 (Mo. 1993)(en banc).

Under Missouri law, the Settling Defendants' "good faith" defense under R.S.Mo. § 537.060 is an affirmative defense on which the Settling Defendants bear the burden of proof. *York v. Authorized Investors Group, Inc.*, 931 S.W.2d 882, 887 (Mo. App. E.D. 1996)("The burden of proof on an affirmative defense rests with the proponent of the defense."). This is consistent with Missouri law generally, that the assertion of "good faith" as a defense to liability is an affirmative defense on which the defendant bears the burden of proof. *Blue Cross Health Servs., Inc. v.* Sauer, 800 S.W.2d 72, 76-77 (Mo. App. E.D. 1990)(defense of good faith holder in due course); R.*J. Haswell v. Liberty Mut. Ins. Co.*, 557 S.W.2d 628, 636 (Mo. 1977)(en banc)(defense of good faith reliance on advice of counsel). Thus, to succeed on its motion for summary judgment, the Settling Defendants must, at a minimum, show that "there is no genuine dispute as to the existence of each of the facts necessary to support [the Settling Defendants'] properly pleaded affirmative defense. *Bargfrede v. American Income Life Ins. Co.*, 21 S.W.3d 157, 161 (Mo. App. W.D. 2000), *citing ITT*, 854 S.W.2d at 381.

The Settling Defendants have failed to discharge this burden. Most significantly, the Settling Defendants have failed to show that there is no genuine dispute with respect to the factual determination that the Settlement Agreements, on which they claim § 537.060's statutory bar, were entered in "good faith."

On one level, the Settling Defendants have failed to discharge their burden of proof because they have failed to proffer **any** evidence in support of the "good faith" element of their alleged affirmative defense. Despite Plaintiffs' counsel's admission in the April 28 conference with the Court that the Plaintiffs' "good faith" in entering the Settlement Agreements is at issue, the Settling Defendants have submitted no deposition testimony from Plaintiffs, no affidavits from Plaintiffs, indeed, no evidence from Plaintiffs at all, establishing this legally required, fundamental element of their defense. In support of their Motions, the Settling Defendants have only proffered a copy of the purported Settlement Agreements. At most, this evidence goes to the fact of the existence of the agreements, but not to the fact of whether they were entered in "good faith." Indeed, as one Missouri appellate court has observed, "pleadings do not prove themselves." *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180, 184 (Mo. App. E.D 1982). For the Settling Defendants' to discharge their burden of proving the "good faith" of the Settlement Agreements, they must proffer evidence to this Court that actually proves the issue of good faith. On the current record, there is no evidence of the Settlement Agreements' "good faith" other than the Settling Defendants' counsels' word for it.

On a more substantive level, the Settling Defendants have failed to discharge their burden of proving the absence of material issues of fact as to whether the Settlement Agreements were entered in "good faith." To the contrary, there is a fundamental and profound dispute on the "good faith" issue which legally prohibits this Court from granting Summary Judgment. As noted at the outset, Missouri law holds that where "there is a contested issue of good faith . . . of the release" it is "appropriate for the trial court to deny summary judgment." *State ex rel. Simmerock v. Brackmann*, 714 S.W.2d 938, 943 (Mo. App. E.D. 1986).

To begin with, the issue of "good faith" is a factual determination uniquely **un**suitable for summary judgment. Evaluating the "good faith" of a settlement inherently involves an analysis of the parties' state of mind and intent. *See Sharma v. Meyers,* 803 S.W.2d 65, 67 (Mo. App. W.D. 1990)(emphasis added); *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 754 (Mo. 1950). Significantly, Missouri law is clear that **"[w]hen the resolution of a case turns on the intentions of the parties, . . . a question of fact exists preventing summary judgment**." *Moore v. Bentrup,* 840 S.W.2d 295, 298 (Mo. App. E.D. 1992)(emphasis added). Indeed, "[i]t has been consistently held that cases in which the underlying issue is one of motivation, intent, or some other subjective fact are particularly inappropriate for summary judgment." *Ganaway v. Shelter Mutual Ins.,* 795 S.W.2d 554, 562 (Mo. App. S.D. 1990). "Rather, the determination of the parties' intent should be left to the jury." *Tuttle v. Muenks*, 21 S.W.3d 6, 9 (Mo. App. W.D. 2000); *United States v. Yellow Cab Co.*, 338 U.S. 338, 341, 70 S.Ct. 177, 179 (1949)("Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.").

Moreover, even on the current, incomplete record, significant disputed issues of fact exist with respect to the "good faith" of the Settling Defendants' settlement agreements. The existence of such disputed issues of fact with regard to the "good faith" of the Settling Defendants' release precludes the entry of summary judgment. *State ex rel. Simmerock,* 714 S.W.2d at 943.

As this Court well knows by now and as detailed above, after prosecuting good faith claims against the Settling Defendants for nearly one year, the Settling Defendants were suddenly released from this lawsuit for **ZERO DOLLARS**. In attempting to justify how a settlement for **ZERO DOLLARS** by a multi-national corporation that admittedly manufactured the instrument involved in the decedent's accidental death and had over $50 million in available insurance could constitute a "good faith" settlement, the Settling Defendants contend—in summary fashion and without evidentiary support—that there was adequate consideration for the

settlement agreement because the Settling Defendants agreed to release Plaintiffs from potential claims of frivolous litigation available to the Settling Defendants arising from this action. The absurdity of this suggestion is palpable. As noted above, for the Settling Defendants' contention to be credible, the record existing at the time of the settlement would have had to have been completely devoid of any evidence of the Settling Defendants' potential liability such that it was not reasonable for Plaintiffs' to have prosecuted their claims against the Settling Defendants in this litigation. This fundamentally was not the case.

In an effort to avoid repeating facts discussed in detail above, the following are categories of evidence already adduced in discovery that strike at the core of any claim that the Settling Defendants' **ZERO DOLLAR** settlement was in "good faith:"

- Lewmar knowingly and regularly sold the snap shackle to stunt companies;
- Lewmar knowingly and regularly sold the snap shackle to these stunt companies with the knowledge that the snap shackle was being used for non-marine, indeed, stunt applications;
- Lewmar knew the snap shackle was used to hoist humans in the air in a variety of applications;
- Lewmar never took measures to prevent the sale of the snap shackle to these stunt companies;
- Amspec representatives directly communicated with Lewmar representatives regarding its purchase of the snap shackle for use in stunt applications;
- Amspec regularly supplied the Lewmar snap shackle for use in stunt applications;

- Amspec regularly modified the Lewmar snap shackle—with Lewmar's knowledge—before selling them for use in stunt applications; and

- Amspec failed to provide any warnings regarding use of the Lewmar snap shackle for use in stunt applications.

This record suggests substantial culpability on the part of Lewmar and Amspec. At a minimum, this record creates a material issue of fact as to whether the settlement agreements were entered in "good faith." As discussed in greater detail above, the facts learned through discovery between March 14, 2000 when Plaintiffs filed their First Amended Complaint, reaffirming their good faith basis for claims against Lewmar and Amspec, and April 17, 2000, when Plaintiffs and the Settling Defendants entered into the settlement agreements, significantly augmented, rather than eliminated, the evidence of the Settling Defendants' culpability in the death of Owen Hart. From this apparent conflict—Plaintiffs electing to release the Settling Defendants at the same time they were developing a more extensive liability record against them—a reasonable juror could conclude that the settlement agreements were not entered into in "good faith." This possibility that a reasonable juror could find that the settlement agreements were not entered into in "good faith" defeats the Settling Defendants Motions as a matter of Missouri law.

Notably, under Missouri law, in considering Summary Judgment Motions, courts should hesitate before stepping into the jury box and adjudicating or weighing the evidence, and disputes thereof where the claims under consideration entitle a party the right to a jury trial. (Mo. App. W.D. 1994); *North Central Co. Fire Alarm System Inc. v. Maryland heights Fire Protection* , 945 S.W.2d 17 (Mo. App. E.D. 1997) The cross-claims for indemnification/contribution of WWFE Defendants against the Settling Defendants are claims which entitle WWFE Defendants to a right to present a full evidentiary record and obtain a jury adjudication under Missouri law. To avoid burdening this Court with duplicative filings, WWFE

Defendants refer the Court to their previously-filed WWFE Defendants' Opposition to Motions to Quash Subpoenas and to Stay Discovery (attached at Tab 13 of the Appendix), and in particular, pages 15 through 19, for a full and detailed discussion of the law.

D. WWFE Defendants' Third-Party Pleading Was Not Deficient As A Matter Of Law

Under Missouri law, pleading liability in the alternative sufficiently alleges a claim for indemnity or contribution against a third-party defendant. Specifically, in *Major v. Frontenac Industries*, 899 S.W.2d 895 (Mo. App. 1995), the Missouri Court of Appeals found that a third-party plaintiff sufficiently alleged a claim for indemnity and contribution by alleging that "in the event [the third-party plaintiff] was found liable, it was entitled to indemnity or contribution" from the third-party defendant.

The third-party defendant in *Major*, as in this case, relied on *Stephenson v. McClure*, 606 S.W.2d 208 (Mo. App. 1980), arguing that the third-party petition failed to state a claim for indemnity or contribution. They argued that the third-party petition affirmatively pleaded that only the third-party defendant had any liability. The Court disagreed, finding that third-party plaintiff pleaded: (1) it sold or leased the product to plaintiff's employer, (2) the product was defective, unsafe and dangerous for its intended uses and purposes, (3) third-party plaintiff neither knew nor had reason to know the product was defective and (4) that "in the event it was found liable, [third-party plaintiff] was entitled to indemnity or contribution from [third-party defendant]."

Indeed, even the *Stephenson* court supports the conclusion that pleading liability in the alternative is sufficient in cases such as the instant one. The court cited with approval the holding of *Fane v. Hootman*, 117 N.W.2d 435 (Iowa 1962), wherein "the cross-claim, filed while

the principal action was pending, sought contribution or indemnity in the event in the principal action the cross-claimant was found to be liable." *Stephenson*, 606 S.W.2d at 214.[12]

The Third-Party Petition in this case alleges that "if WWFE Defendants, or any of them, should be found liable, responsibility for the expenses associated with any damage award and attorneys' fees, expert witness fees and all costs of litigation should rest entirely with Third Party Defendant."[13] Third-Party Petition ¶ 35, 39, 43, 47, 51, 55. Under *Major* and *Stephenson*, this is sufficient to state a claim for indemnity and contribution. If a defendant/third-party plaintiff were not permitted to plead liability in the alternative, third-party plaintiff would be required to admit its own unqualified negligence to plaintiffs, and thereby admit liability in the underlying action. *Cf. Southard*, 904 S.W.2d at 530 (finding it impermissible to "require a defendant/third-party plaintiff to develop and disclose evidence which would effectively make plaintiff's case against that party, in order to defeat a third-party defendant's motion for summary judgment and maintain viability of its third-party claim for contribution or indemnity"). Such a result would be illogical and unjust.

At most, if this Court were to find WWFE Defendants' pleadings deficient—which it should not—this Court should grant WWFE Defendants' leave to amend their pleadings, rather than permanently extinguish their claim on such an unsettled and technical principle of law.

Conclusion

For all the foregoing reasons, the Settling Defendants' Motions should be denied.

Respectfully submitted,

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[12] The cases of *Stephenson v. McClure*, 606 S.W.2d 208 (Mo. App. 1980) and *Mid-Continent News Co. Inc. v. Ford Motor Co.*, 671 S.W.2d 796, 800 (Mo. App. 1984), relied upon by third-party defendants, both involved indemnity and contribution actions wherein the defendant seeking contribution had already settled with the plaintiff.

[13] The Third-Party Petition of Defendants World Wrestling Federation Entertainment, Inc, Formerly Known as Titan Sports, Inc., Vincent McMahon, and Linda McMahon (the "Third-Party Petition") is attached as Tab 16 of the Appendix.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing WWFE Defendants' Opposition to Third Party Defendants Lewmar, Ltd.'s, Lewmar, Inc.'s and Amspec, Inc.'s Motions to Dismiss or, in the Alternative, Motions for Summary Judgment was served this 21 day of August 2000, via hand-delivery upon the following:

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August 21, 2000

VIA HAND-DELIVERY

Clerk
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Kansas City, MO 64106

Re: Martha Hart, et al. v. World Wrestling Federation (WWF), et al., Case No. 99-CV-210774, Division 13

Dear Clerk:

Enclosed for filing please find the original and three copies of the WWFE Defendants' Opposition to Third Party Defendants Lewmar, Ltd.'s, Lewmar, Inc.'s and Amspec, Inc.'s Motions to Dismiss or, in the Alternative, Motions for Summary Judgment in the above-referenced matter. Please return file-stamped copies of this document to our courier for return to our office.

Thank your for your assistance in this matter.

Sincerely,

Juliet A. Cox

JAC/cf/KC01/497073

Enclosures